
Introduction

Despite its social importance, the topic of the significance of race and gender in the law of torts has not received sustained attention largely because, on its surface, the world of torts appears divided between those who suffer injury and those who inflict injury, categories that are race and gender neutral. To be sure, there is a vague awareness that particular social groups are more likely to sustain certain types of injuries, for example, that women are disproportionately hurt by domestic violence and that African American children are at greater risk than white children of suffering injury from exposure to lead paint. However, the conventional wisdom is that the legal rules, concepts, and structures for liability no longer take account of the race or gender of the parties.

This book contests that conventional wisdom and explores how the shape of contemporary U.S. tort law—from the types of injuries recognized, to judgments about causation, to the valuation of injuries—has been affected by the social identity of the parties and cultural views on gender and race. At a time when formal doctrine is neutral on its face and rights and liabilities are stated in universal terms, considerations of race and gender most often work their way into tort law in complex, subtle ways. This book thus pays close attention to the social construction of harms, unconscious cognitive bias that affects legal reasoning, and the tacit measures by which the law places a dollar value on human suffering. We examine the basic building blocks of tort liability—the concepts of intent, negligence, causation, and damages—for evidence of hidden race and gender bias, and we identify the gender and race implications of deep-seated assumptions that mark out the boundaries of the field.

The story we tell is a complex one. Not all tort rules disadvantage women and racial minorities, and it is important to recognize that tort law has been a site for promoting equality as well as for perpetuating hierarchies. Particularly in the past two decades, certain principles and concepts first enunciated in statutory civil rights litigation have migrated into tort law to produce a

more egalitarian body of cases. However, when viewed through a wider cultural lens, the basic structure of contemporary tort law still tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value on their lives, activities, and potential. We trace this thread of devaluation throughout tort law by dissecting the doctrines that can pose insuperable—but most often partial—barriers to the recovery of damages in contexts which specially affect women and racial minorities.

The Measure of Injury offers a critical re-examination of the “proper” domain of tort law, focusing on which injuries have been placed at the “core” of tort law and which harms have been relegated to the margins. The most current revision of the prestigious American Law Institute’s Restatement of Torts (Third) is built around the dual premises that accidental injury lies at the core of tort law and that physical injury, rather than emotional harm or injuries to relationships, is of paramount concern. We question these foundational assumptions on both descriptive and normative grounds. We argue that the privileging of accidental injury is possible only because massive injuries caused by domestic violence and sexual exploitation have fallen outside the realm of compensable harms. In theory, the protection the law offers against intentional harm is certainly capable of capturing injuries suffered by victims of domestic violence and discriminatory workplace harassment. In practice, however, tort law has been a poor vehicle for compensation for these victims and does little to deter even the most blatant forms of aggression and abuse.

Similarly, we contend that the privileged status of physical harm over emotional and relational injury found in contemporary tort law is sustained by dubious assumptions about the greater seriousness and importance of this type of injury in the lives of ordinary people. This book addresses the conceptual weakness of the physical/emotional distinction that pervades the law of torts. We explain how certain injuries—often related to reproduction and motherhood—have been socially constructed as “emotional,” rather than “physical,” with significant implications for the prospects of recovery. In a similar vein, we analyze the recent trend toward eliminating or curtailing noneconomic damages that has emerged as a corollary to the privileging of physical harm. This recent effort has created a hierarchy of damages that ranks economic damages over noneconomic damages and casts doubt on the legitimacy and centrality of many kinds of intangible losses suffered by seriously injured tort victims. We detail how widespread tort reforms, such as the placement of caps on recovery of noneconomic damages, have had serious negative consequences for female and minority plaintiffs. Overall, we

explain how the marginalizing of emotional harm and noneconomic injury has worked to the systematic disadvantage of women and minority plaintiffs, who may find that the most serious recurring injuries in their lives are not compensable in tort.

One of the principal objectives of this book is to connect the current emphasis on negligence, physical harms, and economic damages to gender and race bias, broadly conceived. The book catalogues a variety of mechanisms—in contemporary law and historically—through which racial and gender hierarchies have been sustained and reproduced. In several contexts, old forms of bias have resurfaced in updated forms. In their new guises, the rules for recovery are often softer and less exclusionary but nonetheless operate to perpetuate disparities linked to race and gender. In the realm of intentional torts, for example, the old doctrine of interspousal immunity prevented wives from holding abusive husbands accountable for domestic violence that would otherwise be actionable in tort as battery, assault, or false imprisonment. Today, the obstacles to recovery for domestic violence torts are less total but also less visible. Contemporary claims of domestic violence victims have been stymied by short statutes of limitations, the imposition of technical procedural rules that steer cases into family court, and a system of insurance that denies coverage for women abused in their homes. As a result, tort claims for domestic violence are still exceedingly rare and are regarded as exceptional and problematic.

A similar trajectory can be seen with respect to tort claims for injuries caused by workplace harassment. Prior to the 1980s, racial and sexual harassment were unacknowledged as legal harms and were generally dismissed as harmless teasing, flirtation, or hazing. Largely because of the development of the concept of the “hostile environment,” workplace harassment has now been converted to a legal harm. Nevertheless, tort claims of harassment victims are often defeated by special judge-made rules of preemption and heavy threshold requirements of proof that cordon off these suits from the domain of torts, leaving only statutory civil rights remedies as a possible means of recovery. This sharp separation of civil rights law from torts lessens the amount of recovery for harassment victims; it also sends the message that tort law has no room for promoting race and gender equity and that public policy should not affect the contours of tort doctrine.

With respect to negligence claims, we trace how gender-linked limitations on recovery have been part of the ongoing struggle by which each jurisdiction determines the scope of duties owed by tort defendants. Under the general rubric of recovery for negligent infliction of emotional distress, courts

routinely confront gender-inflected issues of sexual exploitation, reproduction, and parent/child relationships. The barriers to recovery in such emotional distress cases have increasingly been liberalized, as courts chip away at the old common law doctrine that denied all legal protection for mental disturbance. In this chaotic area of law, however, courts continue to impose a host of limiting doctrines—from refusing to recognize “stand-alone” claims for emotional distress to insistence on the existence of a contractual relationship between the parties—that are designed to make recovery more difficult than in “ordinary” cases of negligence, such as automobile accidents or slip-and-fall cases. Following a pattern characteristic of contemporary forms of bias, the gender dynamic in these cases does not favor individual male plaintiffs over similarly situated female plaintiffs but instead operates to disfavor the type of claim that women plaintiffs are likely to bring, placing them at a considerable structural disadvantage.

In addition to focusing on how tort law selects injuries for legal recognition, the book explores how cultural attitudes on race and gender affect legal judgments about causation. Employing the language of both traditional tort theory and social and cognitive psychology, we explain how seemingly simple judgments of cause and effect can mask more complex, controversial assessments of blame and responsibility. Our critique of the legal doctrine of causation argues that the quasi-scientific inquiry into “cause-in-fact” ought to be recast as an active mental process of “causal attribution.” Once this turn is made, it is easier to appreciate how prevailing gender and race stereotypes, race- and gender-based schemas, and other common cognitive “shortcuts” infect causal judgments and bias decision making.

In certain types of cases, the gender and race of the victims are so salient that they deflect attention from the negligent actions of the defendant, making it seem more likely that the plaintiff is solely responsible for the adverse outcome. The book discusses how issues of causation have been deployed in “wrongful birth” and lead paint cases to both expand and limit claims for marginalized groups. In the context of wrongful birth—a cause of action almost unthinkable prior to *Roe v. Wade*—changing cultural attitudes about reproduction and gender gradually led many courts to shift causal responsibility for an infant’s genetic defects away from the pregnant woman and onto the physician who negligently failed to inform her of available reproductive options. We trace how, over time, the causation issue has been framed differently, pointing to dramatically different results. In contrast, in lead paint cases, landlords and housing authorities that negligently failed to abate toxic hazards have sometimes succeeded in their attempts to claim that a minority child’s cognitive

impairment was traceable to preexisting conditions rather than to exposure to lead paint. We discuss how a court's willingness to ascribe cause to "internal" factors, such as genetics and family background, may be linked to the racial identities of the plaintiffs, particularly in multiple-cause cases where a combination of factors contributed to an adverse outcome. Through these examples, we tease out the cultural dimensions of causal attribution and its dependence on norms and expectations linked to gender and race.

Finally, because the law of damages is so central to tort recovery, *The Measure of Injury* concludes with an in-depth analysis of the methods and processes of the valuation of injury. In the realm of torts, court and juries not only determine liability but are required to measure injuries, as well. Not unlike sentences meted out in criminal cases, tort measurements of lost earnings potential, pain and suffering, and other types of damages can be affected by negative attitudes toward social groups and are not immune from conscious and unconscious gender and race bias. In our sections on economic and noneconomic damages, we focus on the practical effects on women and minorities of statistical tables widely used to predict future economic losses and on the recent cutbacks in awards of noneconomic damages. We also highlight the expressive importance of tort damages as a signal of the social worth of plaintiffs and a societal measure of their suffering.

Our examination of the practices relating to the calculation of lost future earning capacity provides a dramatic illustration of how basic racial and gender hierarchies can be replicated by using low-visibility methods of computation that continue to be based explicitly on the race and gender of the plaintiffs. We discuss how courts and experts in both the United States and Canada have routinely relied on gender- and race-based tables to determine how many years severely injured plaintiffs would have worked if they had not been injured and the amount they would have earned in their lifetimes. This statistical practice tends to yield significantly higher awards for white men than for women of all races and minority men and is reminiscent of the segregationist practices of courts in the Deep South, which pegged tort recoveries of black plaintiffs to prior awards for other black plaintiffs. We also analyze two important recent rulings—by the Special Master of the September 11 Victim Compensation Fund and by Federal District Judge Jack Weinstein in the high-profile Staten Island ferry crash case—that reject such gender- and race-based calculations and devise more egalitarian methods for valuing injuries.

Our discussion of tort damages takes up the contentious debate over the legitimacy of awarding plaintiffs money damages for intangible, non-

economic losses. We critique the recent legislative assault on noneconomic damages brought about by the enactment of caps on this portion of a plaintiff's damage award, stressing the unequal effects such caps have on persons whose injuries defy monetization and who are unable to prove the value of their loss in market-based terms. We argue that the case for imposing such caps is flawed and based on a false dichotomy between the economic and the noneconomic aspects of a plaintiff's injuries. Much like the physical/emotional distinction that denies recognition for certain types of injury, this dichotomy has had the effect of discouraging inquiry into the specifics of plaintiffs' injuries and minimizing the seriousness of those injuries. Denying full recovery for noneconomic harm disparately affects a class of largely female plaintiffs, including those with serious injuries and those who allege sexualized and reproductive harm, as well as elderly plaintiffs in nursing homes. In addition to these gendered effects, we cite evidence that caps on noneconomic damages negatively affect minority plaintiffs, whose cases are more likely to be rejected by prospective attorneys because they will not yield sufficient economic damages to make the lawsuits worth pursuing. The net result of these reforms is to reinforce gender and race disparities and to blunt the more egalitarian effects of jury awards at a moment in history when juries represent the most diverse site of decision making in the torts system.

Most of this book is devoted to describing and deconstructing contemporary tort law. We identify both doctrinal and structural obstacles to gender and race equity and isolate various mechanisms that reproduce disadvantage and disparities. At points, our description is detailed and traditional, focusing in on specific rules, such as the preemption of tort claims for workplace harassment, that are clearly embedded in gendered and racialized contexts. At other points, our description of cognitive biases, tacit hierarchies, and dichotomies that pervade the law is more interpretive and critical; it functions as argument as well as simple description. The connection we draw between the low value placed on emotional harm and the legal treatment of reproductive harms, for example, is meant simultaneously to explain the gender implications of an intricate legal doctrine and to critique the inadequate protection provided to women for a serious injury for which there is no clear male analogue.

Throughout the book, we move from deconstruction to reconstruction and offer some proposals for changes we see as desirable. Our advice on reforming tort law is limited and highly contextual. We suggest both large and small reforms that could push tort law in a more egalitarian and more just direction. Matching our critique, some of our proposals are very specific and pointed,

including our proposal for rejecting gender- and race-based tables in favor of more inclusive, neutral computations to measure damage awards. Other prescriptions are pitched at a higher level of generality, such as our advocacy for allowing principles of human and civil rights to migrate into tort law in order to update and transform tort concepts of outrageousness and dignitary harm. Many times, we simply urge that the gender and racial contexts of tort cases be made more visible, even if it means little more than labeling a case one of “harassment,” “sexual exploitation,” or “reproductive harm,” rather than only intentional or negligent infliction of emotional distress.

The approach to tort law we employ in this book differs from the dominant intellectual approach in the United States, which draws heavily from the “law and economics” school, with its emphasis on the efficiency of tort rules. Instead, our critical approach to tort law is not tied to any one school of thought but is influenced by a diverse body of scholarship, within and outside the discipline of law. Throughout the book, we draw upon what is now regarded as “traditional” legal scholarship, particularly theories of equality and civil rights principles developed in constitutional law and statutory anti-discrimination fields, such as employment discrimination law.

Many of our normative commitments and methodologies have been borrowed from the vast multidisciplinary feminist literature that has filtered into law, humanities, and social sciences. With respect to feminist theories, we lean extensively on several of the major perspectives within feminist legal thought—on liberal feminism, with its emphasis on formal equality and equal opportunity, on cultural feminism, with its revaluation of traditionally feminine activities and traits, and on radical feminism, with its condemnation of sexual exploitation and abuse. In attempting to intertwine the major themes of race and gender, we share the viewpoint of postessentialist and critical race feminist writers who have maintained that systems of subordination are interlocking and interdependent and who have insisted that the specific situation of racialized subgroups of women and men may differ radically from those in the mainstream.

Our perspective on race and tort law is informed by an antiracist and critical race literature that regards race as a persistent and central feature in American culture. From this literature we take up one of the prominent themes of this book, namely that slavery and segregation have left an imprint on tort rules and structures and that white racial privilege still affects the recognition and valuation of injury. It is our contention that race also matters in everyday judgments of cause and effect and assessments of responsibility for injury. In our white-dominated society, the lingering cognitive association of blackness with

inferiority and with the lack of value can distort legal judgments, devaluing and sometimes erasing the pain and suffering of people of color.

Finally, another particularly important influence that informs our perspective on tort law comes from social and cognitive psychology. We apply insights from that field to help us understand how the decisions of legal actors might be affected by race and gender, even when such actors are unaware of any bias and have no conscious desire to advantage or disadvantage a particular social group. As they operate in institutional contexts, common forms of cognitive bias—particularly habits of thought that make it harder to imagine different outcomes—can affect expectations about what is normal and reasonable and therefore ultimately impact legal liability. The psychological perspective has special relevance to the law because it provides a crucial mediating link between cultural attitudes and decisions made within legal frameworks and institutions.

As with much of the critical literature of the past three decades, this book pays particular attention to the multiple ways power and privilege play out in specific social contexts and to the social construction of legal meanings. In this respect, we regard tort law as a particularly appropriate site for investigating differing “common sense” understandings of such fundamental constructs as dignity, reasonableness, cause, and injury.

On a final note, we wish to underscore one special feature of tort law as a site for progressive reform—its capacity to express and reinforce universal norms and principles. Thus, although this book analyzes the significance of race and gender in tort law—and thus falls under the genre of identity-based scholarship—we are well aware that for many persons the appeal of tort law is that it is not closely tied to identity politics. Interestingly, the migration of civil rights concepts into tort law has the capacity to universalize claims of equal treatment and equal justice beyond traditionally protected groups of plaintiffs, such as women and racial minorities. In this respect, progressive changes in tort law may sometimes disrupt binary categories (such as black or white or male or female) by allowing recovery to plaintiffs whose injuries do not fit the familiar script of gender- or race-based injury.

Organization of the Book

The organization of this book tracks the major demarcation lines in tort law, with chapters on intentional torts, negligence, causation, and damages. For each of these chapters, we have selected topics which best expose the workings of race and gender in those substantive areas. The four substan-

tive law chapters are preceded by two chapters on tort theory and history. In these framework chapters, we situate our approach to tort law within the larger theoretical landscape and discuss important historical themes related to race and gender that are recapitulated in contemporary cases.

Chapter 1 introduces our critical approach to tort law and distinguishes our approach from the two tort theories that currently dominate the field, law and economics and corrective justice. We explain how our approach is influenced by a strong Legal Realist tradition in tort law and by the impact of the Restatement of Torts, including the Restatement of Torts (Third) that is currently under way. We discuss the body of feminist and critical race scholarship that provides the main ingredients for our approach, as well as existing critical torts scholarship focused on gender and race. We conclude chapter 1 by aligning ourselves with “pluralist” scholars who regard the quest for a unified theory of torts as futile and undesirable and applaud tort law’s historical capacity to transform itself by absorbing concepts, principles, and norms from other areas of law.

Chapter 2 presents some of the major themes of the book through an examination of two groups of early cases that clearly show the impact of gender and race on the outcome of tort litigation. After a brief discussion of the importance of the institutions of slavery and coverture on the rights of tort plaintiffs, we examine a line of “nervous-shock” cases brought by female plaintiffs at the turn of the 20th century. We trace the development of the “impact” rule that served in many states to defeat recovery for women who suffered miscarriages and stillbirths as a result of shock and fright caused by defendants’ negligence. In these nervous-shock cases, we witness courts struggle with the proper classification of injuries cognitively associated with women and the emergence of a dichotomy between physical and emotional harm that continues to pervade the law of torts. Chapter 2 also introduces the concepts of racial devaluation and white racial privilege through an examination of segregation-era cases in which courts took note of the race of the parties and indicated the effect of race on their judgments about liability and damages. We discuss the positive value some courts placed on whiteness and the rights conferred on white plaintiffs to receive compensation when they complained of “insults” from racial minorities. The chapter concludes with an examination of suits brought by African Americans in which their injuries were minimized or devalued by judges who treated their claims less favorably than those of similarly situated whites.

In chapter 3, devoted to intentional torts, we criticize the marginal status that intentional torts currently occupies in contemporary tort law and ana-

lyze the slim protection tort law provides for two undertheorized claims of particular importance to women and racial minorities—claims for domestic violence and for workplace harassment. Our examination focuses principally on the tort of intentional infliction of emotional distress, the relatively new cause of action that allows plaintiffs to recover for “outrageous” conduct that produces severe emotional injury. We explore several doctrinal and structural barriers to recovery for these harms, ranging from lack of insurance coverage, to procedural joinder rules, to preemption of tort claims, all of which have the effect of steering domestic violence and harassment claims away from torts and into other areas of the law, such as family law and statutory civil rights law. We criticize this constricting of the domain of tort law because it often leads to lower and inadequate compensation of victims, threatens to stunt development of general tort principles, and sends a dismissive message that these widespread harms do not measure up as injuries worthy of universal protection under tort law.

We address the tort of negligent infliction of emotional distress in chapter 4. The chapter analyzes a growing body of contemporary negligent infliction cases that implicate plaintiffs’ interests in sexual integrity and autonomy and in reproductive choice and health. We also discuss “bystander” suits involving claims of parents and other family members who suffer shock and distress from witnessing the death or injury of their children or other intimate family members. The chapter traces several special limitations on recovery imposed by the courts and criticizes judicial efforts to contain liability in emotional distress cases by means of “neutral” rules that do not depend on context. We argue that courts in torts cases should be sensitive to context and should place a high priority on protecting plaintiffs’ sexual, reproductive, and intimate familial relationships against negligent injury, analogous to their protection as fundamental interests under the U.S. Constitution.

Chapter 5 examines the legal requirement of cause-in-fact and its relation to the psychological process of causation attribution. We discuss how gender and race stereotypes and other cultural attitudes linked to gender and race may affect judgments about cause and effect in tort litigation. We use two case studies—“wrongful birth” cases and lead paint cases—to analyze cultural shifts in the understanding of causation and to highlight the danger of race and gender bias in “multiple cause” cases when courts and juries must decide whether injury was produced in part by an external or situational force, rather than stemming exclusively from an internal or dispositional source, such as a minority child’s genetic makeup or family environment.

Chapter 6 explores how considerations of race and gender have affected the amount of damages awarded to plaintiffs in personal injury cases. We critique the use of race-based and gender-based tables and statistics in computing loss of future earning capacity, arguing that such estimations are neither accurate nor equitable. With respect to noneconomic damages for pain and suffering and other intangible losses, we analyze the disproportionate impact legislative caps on such damages have had on women and racial minorities and argue that noneconomic losses should be treated on a par with economic losses.

The book concludes with a summary of the various pathways through which considerations of race and gender find their way into tort law. We offer three general prescriptions for progressive change designed to make the law more equitable and more responsive to the interests of women and minorities.